petitioner's brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-773

SCOTT HUDGENS, AN INDIVIDUAL,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

AND

LOCAL 315, RETAIL AND WHOLESALE DEPARTMENT STORE UNION, AFL-CIO,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App., pp. A1-A15)[1] is reported at 501 F. 2d 161 (1974). The supplemental decision and order of the National Labor Relations Board (Pet. App., pp. A17-A20) is reported at 205 NLRB No. 104 (1973). The initial decision and order of the Board (Pet. App., pp. A33-A40) is reported at 192 NLRB 671 (1971).

1. The opinions below are reproduced in the appendix to the petition for a writ of certiorari (hereafter "Pet. App."). Supplemental materials, including portions of the transcript of the hearing before the Administrative Law Judge, as well as exhibits introduced in that proceedings, are reproduced in the separate Appendix (hereafter "App.").

JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit (Pet. App., pp. A1-A15), enforcing the supplemental decision of the Board, issued on September 25, 1974. The Court thereafter entered judgment (Pet. App., p. A16) on October 18, 1974, and this Court granted the petition for a writ of certiorari on March 17, 1975. Jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 29 U. S. C. § 151, *et seq.* (the "Act"), are set forth below:

* * * * *

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

* * * * *

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

* * * * *

QUESTIONS PRESENTED

1. Is the relationship between consumer picketing and shopping center property relevant to determining whether pickets have any right under the Act to require that the private property rights of the center owner must yield? If so, was the picketing in the instant case sufficiently related to the business of Petitioner's shopping center, notwithstanding that there was no labor dispute at the Center, to meet this test?

2. Is the test of *N. L. R. B.* v. *Babcock & Wilcox*, 351 U. S. 105 (1956)—that those seeking to exercise rights under the Act may not dislocate private property rights unless there is either discrimination or no alternative means of communication available—also determinative where there is consumer picketing on a private shopping center; or is the *Babcock & Wilcox* standard restricted to only organizational activities? Assuming the *Babcock & Wilcox* rule encompasses consumer picketing, was that test met in the instant case where there were other alternative means of communication to picketing on the interior shopping mall of Petitioner's center?

STATEMENT OF THE CASE

Petitioner's North DeKalb Shopping Center, located in an unincorporated area of Decatur, Georgia, is a modern shopping center[2] in which a substantial investment has been made to provide a comfortable and attractive interior mall area which permits shopping in an atmosphere free of distraction or interference.[3] Because disruptive activities in the mall would be

2. The Center draws its customers from throughout the metropolitan Atlanta, Georgia area. Diagrams showing the layout of the Center, including its enclosed interior shopping mall, appear at App., pp. 50-51.

There are five entrances to the Center, each of which contains a public right-of-way. Two entrances are located just after a stoplight and require a slow turn into the Center. The other three approaches are from lightly travelled, primarily residential streets and require a full stop prior to entry. After traversing the parking lot, and crossing a raised sidewalk, there are then four entrances to the enclosed interior shopping mall. One of the entrances is located only fifty feet from the retail store of the Butler Shoe Company—the particular tenant store involved here—and eighty-five to ninety percent of the customers of that store utilize that entrance (Pet. App., p. A35; App., pp. 11-12, 50, 51, 103-107, 110-111, 144).

3. The shopping mall, which is maintained by Hudgens, is fully enclosed, temperature controlled, and appointed with planters, benches, fountains, and other attractions to encourage customer patronage (App., pp. 115-116). The mall area has also been carefully designed to merge the stores and non-selling areas into a single market area; the stores have an unobstructed footage on, and their displays and merchandise are easily visible from, the thirty to forty foot wide mall common aisleways (App., pp. 41-51, 110, 115-116). Many tenants, such as Butler, also display high impulse items on their leased property in front of the stores (App., pp. 43, 120).

There are also three commercial kiosks (mall sales booths), leased at a high rental rate, actually located in the middle of the mall common aisleways (App., pp. 48-49, 108-109, 113-114, 116-117). Hudgens also maintains a charity kiosk (App., pp. 108-109) whose use is meticulously regulated to preclude any interference with the Center's commercial operations. A permit must first be sought to use the booth and, if the applicant is granted permission, he must display the permit (App., p. 60). Persons occupying the booth without a permit are forced to leave. Only the sale of homemade goods is

adverse to the commercial interests of Hudgens and its tenants,[4] as well as involve added maintenance and security expense to Hudgens (App., pp. 130-131, 154-155), the Center has uniformly and nondiscriminatorily forbidden *all* activity which does not directly relate to Center business (App., pp. 122-126, 129, 130-131, 154-157).[5] This rule is strictly enforced against tenants and strangers alike (App., pp. 122-126, 129, 130-131, 55-57).[6] See *Steffel* v. *Thompson*, 415 U. S. 452 (1974), involving enforcement of the same Center prohibition against nonunion activities.

One of the Center's sixty tenants is the Butler Shoe Company which has nine retail stores in the greater Atlanta, Georgia area. Although no employee of that store was involved in any

permitted, and users are admonished, in accordance with a reminder notice posted inside the booth, that they are forbidden to operate outside the booth or to solicit Center customers from the booth (App., pp. 124-128).

4. Hudgens, in addition to the minimum rent charged tenants, also receives a percentage of their gross sales (App., p. 52).

5. The Center is clearly marked and maintained as private property. The mall area, for example, is locked each night, and during certain days access is also denied to the public. There is a security patrol which regularly protects the Center. There are also dress and pet regulations in the mall area, and parking regulations in the parking lots, promulgated and enforced by Hudgens. (App., pp. 45, 111-112, 150-154).

6. The Center thus receives and regularly denies from fifteen to twenty-five requests a week from various persons and groups who seek to use the Center's premises for purposes unrelated to its business functions (App., pp. 123-125, 154-155). Moreover, as a specific condition of their tenant agreements, Center tenants are obligated not to "encumber or obstruct the sidewalks, malls or common areas", display anything thereon without Hudgens' permission or even maintain any exterior "advertising matter or thing of any kind." This condition is, and has been, strictly enforced (App., pp. 114-115, 120-121, 156-157, 55-59). Even tenants' sound reproductions must not emanate into the mall from the stores (App., pp. 57-58), and all signs which tenants desire to use must first be approved by Hudgens (App., p. 58).

union activity, and there was no labor dispute at the Center,[7] various individuals employed by Butler at its Atlanta warehouse and represented by Respondent Local 315, Retail and Wholesale Department Store Union, sought to engage in consumer picketing [8] at the Center on January 22, 1971, as well as contemporaneously at the other Butler retail stores in metropolitan Atlanta, in furtherance of the Union's contract demands at the warehouse.

Prior to the commencement of picketing and before the Center stores opened, the Center manager noticed four of the potential pickets seated in the mall with picket signs, and asked them to leave. They then left, only to return and commence picketing on the mall's common aisleways adjacent to the Butler store. After picketing for about one-half hour, the Center manager again asked the pickets to leave (App., pp. 12, 98).[9] When they declined this request, he threatened to have the police arrest them for a violation of the Georgia Criminal Trespass Law.[10] The pickets then left the premises and the Union filed

7. The pickets have never worked at the Center, have never sold shoes, did not know any of the Center Butler store employees, and were not supervised by the supervisors of that store (App., pp. 77, 82-83, 88-89, 91-92, 97-99, 148).

8. Four to five pickets walked in parallel lines in front of the store, so that they would occasionally be abreast of each other, with picket signs reading "Butler Warehouse is on Strike, AFL-CIO Local 315" (App., pp. 12, 98).

9. Although there was a conflict in the record as to what Center Manager Ballard told the pickets (see Pet. App., p. A3, n. 4), the Board's Administrative Law Judge discredited Ballard's testimony that he advised the pickets that they were only banned from the interior mall and that they could picket outside the mall at the various entrances thereto (Pet. App., p. A26; App., pp. 17-18, 19, 12-13, 134-135). Notwithstanding this determination, however, it is undisputed that all parties were put on notice (Pet. App., p. A25; App. p. 25) that the proscription upon the Union's picketing pertained *only* to the mall interior and that picketing elsewhere on Hudgens' property was permissible.

10. Title 26, Ga. Code Ann. § 26-1503, which provides:

> (a) A person commits criminal trespass when he . . . knowingly and maliciously interferes with the possession or use of the property of another person without his consent.

(Footnote continued on next page)

the instant charges with the Board alleging a violation of Section 8(a)(1) of the Act (App., p. 3).

In its initial decision (Pet. App., p. A38), the Board sustained the charge, finding that because the Center mall was "generally open to public access" when the picketing occurred, *Amalgamated Food Employees Union, Local 590* v. *Logan Valley Plaza, Inc.*, 391 U. S. 308 (1968) "establishes the Union's right to picket at the location it chose." (Pet. App., pp. A37-A38). Hudgens then petitioned the Fifth Circuit to review that decision. During the pendency of that appeal, however, after this Court's decisions in *Central Hardware* v. *N. L. R. B.*, 407 U. S. 539 (1972), and *Lloyd Corp.* v. *Tanner*, 407 U. S. 551 (1972), issued, the Board obtained a remand to reconsider its decision and, in turn, remanded the case to an Administrative Law Judge. The Law Judge ruled that the rule of *Babcock & Wilcox* governed, but held that since the Union "had no other reasonable access to Butler's customers coming to the DeKalb shopping center," the test of that case had been met. (Pet. App., p. A31). The Board affirmed, but on a different rationale; that because the Center mall was open to the public, pickets could not be excluded. (Pet. App., p. A19). On Hudgens' petition for review, the Court of Appeals, rejecting the Board's approach but enforcing its order, fashioned its own test. It held that since the picketing was directed at members of the public who might patronize the Butler Shoe store, this fact served to both make the picketing relevant to the property and to render alternative channels of communication, short of picketing in the enclosed mall, "patently inappropriate." (Pet. App., p. A13).

> (b) A person commits criminal trespass when he knowingly and without authority . . . remains upon the land or premises of another person . . . after receiving notice from the owner or rightful occupant to depart.

Hudgens subsequently petitioned the Georgia Courts for a declaration of rights that, under the Georgia Criminal Trespass Law, it had a right to exclude the Union's pickets. The Georgia Court of Appeals, however, held that the matter was preempted and subject to the exclusive jurisdiction of the Board (..... Ga. App. ....., 210 S. E. 2d 821 (1974), *cert. den.* ..... Ga. ..... (1974). Hudgens' petition for a writ of certiorari (No. 74-1032) to review that decision has not yet been ruled upon by this Court.

SUMMARY OF ARGUMENT

1. In *Babcock & Wilcox*, this Court held that Section 7 rights and constitutionally protected property rights must be accommodated by requiring a union to use available alternative means to communicate its message as a prerequisite to appropriating private property. Although this rule was formulated in an organizational case context, both the Board and its administrative judge correctly concluded that the same rationale also governed the consumer picketing at issue in this case.

The Board's appellate counsel, however, in derogation of the Board's decision, inconsistently urged that, instead of *Babcock & Wilcox*, this case is controlled by either the constitutional principles of *Logan Valley* or the employee standards of *Republic Aviation*. Neither of these contentions have merit. The suggestion that *Logan Valley* is determinative flies in the face of this Court's admonition in *Central Hardware* that statutory cases are not subject to adjudication by constitutional criteria. And the argument that the employee standards of *Republic Aviation* apply, and that consideration of alternative channels analysis may therefore be dispensed with altogether, was properly rejected by the court below. *Republic Aviation* only pertains to the protection of employees on their employer's property pursuant to a work relationship, a situation not present in the instant case.

2. The lower court also held that before the Union had any right *at all* to picket on private shopping center property, its picketing must first be found to be related to that center. It applied this relationship requirement so broadly, however, as to be a meaningless requirement. Assuming that a relationship requirement is applicable, there must be a labor dispute at the situs if that test is to have any meaning at all. Where, as

here, the dispute is at a distant situs and does not involve any center employees, the relationship test has not been met.

3. While the Board and Court of Appeals properly concluded that *Babcock & Wilcox* applied, they grossly misapplied the standard of that case. Contrary to their view—that the broad audience which was the subject to the Union's message rendered the use of alternatives to picketing inside the Center's enclosed mall inappropriate—it was precisely that expansive audience that rendered the use of alternatives particularly appropriate. The Union here had, in addition to the right to safely picket at public locations immediately adjacent to the Center, countless effective alternatives to communicate its message to the citizenry of metropolitan Atlanta short of appropriating Hudgens' property. The Union had, therefore, no right under *Babcock & Wilcox* to confiscate Hudgens' private shopping center property for that purpose.

ARGUMENT

I.

THIS CASE IS GOVERNED BY THE TEST OF N. L. R. B. v. BABCOCK & WILCOX.

In *Babcock & Wilcox*, this Court enunciated the applicable standards where there is a conflict between rights under the Act and private property rights: "that an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution" 351 U. S. at 112. Both the Administrative Law Judge and the Board in its supplemental decision agreed that this test controlled the disposition of the instant case. Thus, the Law Judge declared, "[c]learly the test now to be applied to the case at bar is that set out in *Babcock and Wilcox*." (Pet. App., p. A31). And the Board similarly held, relying (Pet. App., p. A18) upon the reasoning of its decision in *Peddie Buildings*[11] in which it stated: "For the reason expressed by the Supreme Court in *Central Hardware, supra*, we find the principles of *Babcock and Wilcox*, rather than those of *Logan Valley*, to be applicable to the present case." 83 LRRM at 1068.

Board appellate counsel, however, "[c]hanging horses in midstream" (Pet. App., p. A6), disavowed the *Babcock & Wilcox* test. Before the lower court, he urged that the wholly different standard of *Republic Aviation Corp.* v. *N. L. R. B.*, 324 U. S.

11. *Frank Visceglia and Vincent Visceglia, t/a Peddie Buildings* 203 NLRB No. 27, 83 LRRM 1066 (1973), *enf. denied, N. L. R. B.* v. *Visceglia, t/a Peddie Buildings*, 498 F. 2d 43 (3rd Cir. 1974).

793 (1945),[12] was dispositive. Then, in his most recent opportunity—in the brief in opposition (pp. 7-9) to the petition for writ of certiorari—Board counsel posited still another position, that as the Board had originally concluded but thereafter repudiated (compare Pet. App., p. A38 with Pet. App., pp. A18, A31), the constitutional principles of *Logan Valley* were the correct criteria. And finally, as already noted, the Court of Appeals, in rejecting the applicability of both *Babcock & Wilcox* and *Republic Aviation*, instead fashioned still another rule: that, in addition to the "consideration of alternatives required by *Babcock and Wilcox*," in consumer picketing situations, unlike organizational cases, "the relationship between the picketing and shopping center operations . . . is relevant to determining whether the pickets have any right *at all* to conduct consumer picketing inside a private enclosed mall . . ." (Pet. App., pp. A9-A10; emphasis added). In applying this additional criterion, however, the court below rejected a "strict relationship requirement"; it held that as long as picketing is directed at potential patrons of a shopping center, even though there is no labor dispute at the situs or relationship between the picketing "and the actual operation of an individual store in the shopping center", the relationship test has been satisfied (Pet. App., p. A12).

The Board, it is submitted, was correct in holding that *Babcock & Wilcox* presents the correct rule for adjusting the conflicting property rights and Section 7 rights involved in this case. Its error, as demonstrated *infra*, was that it failed to properly apply that test. Various preliminary considerations have, however, been interposed by the conflicting positions taken by Board's appellate counsel in derogation of the Board's decision, and by the new test formulated by the lower court. Accordingly, we initially show that *first*, there is no First Amendment question

12. Under the *Republic Aviation* test, employees on their work premises may engage in Section 7 activities without regard to the existence of alternative forums of communication unless it can be shown that a limitation is necessitated by the special circumstances of the case.

presented in this case, and *Logan Valley* is, therefore, inapplicable; *second*, that the employee rule of *Republic Aviation* is also not relevant to this case; and *third*, that the relationship rule formulated by the lower court, if it is to constitute a meaningful additional criterion for consumer picketing cases, cannot be given the broad interpretation accorded by the Court of Appeals.

A. There Is No First Amendment Question Involved in This Case.

The contention that *Logan Valley* is dispositive[13] flies in the face of this Court's admonition in *Central Hardware* against deciding Section 7 cases on constitutional grounds. 407 U. S. at 545. Even the dissenting opinion in *Central Hardware* agreed that, by resolving a Section 7 case "under *Logan Valley*, the agency and lower court decided a difficult constitutional issue that might well have been avoided by deciding the case under the [Act] . . . The principle is well established that decisions on constitutional grounds should not be reached unnecessarily." 407 U. S. at 549 (dissenting opinion). That same principle is equally applicable to this case. The Act, after all, "does not give union members the same comprehensive rights to free expression on the private property of an employer that the First Amendment gives to all citizens on private property that is the functional equivalent of a public district." 407 U. S. at 548 (dissenting opinion). Here, therefore, regardless of whether the pickets may have had a constitutional right to picket on the Center mall,[14] this case must be adjudicated under the different criteria of the statute.

13. Board appellate counsel's assertion of the very approach actually declared inapplicable by the Board itself constitutes a particularly abusive breach of the rule against utilizing *post hoc* rationalizations of counsel in support of an agency's order. See *N. L. R. B.* v. *Metropolitan Life Insurance Co.*, 380 U. S. 438, 443-444 (1965); *Burlington Truck Lines* v. *U. S.*, 371 U. S. 156, 168 (1962); and *N. L. R. B.* v. *Food Store Employees Union, Local 347*, 417 U. S. 1, 9 (1974).

14. Even if this were a constitutional, rather than Section 7 case, the dislocation of property rights ordered by the lower court would be impermissible. *First*, the interior of the shopping mall is not public

The Act, of course, may grant "broader" rights than the First Amendment, *viz.*, the Act permits access on private property, regardless of its functional equivalence to public property, "where a union has *no other means* at its disposal to communicate with employees other than to use the employer's property," or where the employer discriminates against those engaged in union activities, *Central Hardware*, 407 U. S. at 548 (dissenting opinion; emphasis added). The Act, for example, would permit a dislocation of private property under *Babcock & Wilcox* where a union had no alternative methods of communication (see, e.g., *N. L. R. B.* v. *S. & H. Grossinger's, Inc.*, 372 F. 2d 26, 29 (2nd Cir. 1967)), while the First Amendment may not require access in such a situation. Cf. e.g., *Flower* v. *U. S.*, 407 U. S. 197, 198 (1972). The principle remains, however, that, whether "narrower" or "broader" than the First Amendment, Section 7 cases must be resolved by statutory criteria; as the Board has recognized, "[i]rrespective of what the Board may have held in cases prior to . . . *Central Hardware* . . . the law is now settled that *Logan Valley* decided *only* constitutional issues, not Section 7 rights, and the fact that one's constitutional rights may have been violated in a given case does not solely by virtue of that

property, nor the functional equivalent of public property (see fn. 5, *supra*); *Marsh* v. *Alabama*, 326 U. S. 501 (1946), the genesis of the functional equivalence thesis, has limited current vitality: "*Marsh* involved a 'company town,' an economic anachronism rarely encountered today." *Central Hardware*, 407 U. S. at 545. *Second*, as discussed *infra*, in contrast to *Logan Valley* (391 U. S. at 320, n. 9), "the message sought to be conveyed to the public [here had not] concerned the matter in which that particular market was being operated." The picketing was basically unrelated to the Center; there was no dispute concerning the operation of the Butler store at the Center; there was no labor dispute at the situs; and the employees of Butler at the Center were not even members of the Union. In these circumstances, the pickets were as unrelated to the Center as were the handbillers in *Lloyd*, and, accordingly, because of the availability of alternative means of communication open to them, would not have been able to appropriate Hudgens' private property for their expressive conduct had a court been confronted with the constitutional question. *Logan Valley*, therefore, even if this were a constitutional case, would be inapposite.

fact become a violation of Section 7 of the Act." *S. E. Nichols of Ohio*, 200 NLRB 1130, 1131 (1972) (emphasis the Board's; footnote omitted).

B. Republic Aviation Co. v. N. L. R. B. Is Inapplicable to This Case.

Board appellate counsel's attempt to interject the employee standards of *Republic Aviation* was properly rejected by the Court of Appeals, which characterized it as being "farthest afield", a "misapplication of *Republic* [that is] particularly inappropriate", and a contravention of *Lloyd* and *Central Hardware* (Pet. App., pp. A8-A9). The basis for the *Republic Aviation* rule, which precludes employers from barring employee union solicitation on the work site absent special circumstances of discipline or production, is that such activity between fellow employees on their mutual work premises presents "the very time and place uniquely appropriate and almost solely available to them therefor." *Republic Aviation Corp.*, 51 NLRB 1186, 1195 (1943), quoted with approval by this Court upon review. 324 U. S. at 801, n. 6. Because the countervailing interests of the employer's right to control *access* to his property are not present in such a situation, and only disciplinary considerations are involved, resort to alternative channels of communication is not required. This distinction, as *Babcock & Wilcox* emphasized, is "one of substance." 351 U. S. at 113. It is a distinction, however, which cannot be predicated upon a mechanical application of the definition of "employee".

The *Babcock & Wilcox* test does not turn upon whether the person asserting Section 7 rights is an "employee," but rather, upon whether that person has been invited to the situs in the course of an employment relationship. Thus, while *Babcock & Wilcox* dealt with nonemployees, both the Board and the courts of appeal have held that it also governs the right of access of persons, such as off-duty employees, who, while technically

employees, have no invitation to be on the employer's premises at other times. As the Board explained in *GTE Lenkurt*, 204 NLRB No. 75, 83 LRRM 1684, 1685-1686 (1973), in holding that off-duty employees could be barred from entering their employer's property for Section 7 purposes during shifts other than their own:

> [The off-duty employee's] status is more analogous to that of a nonemployee and he is subject to the principles applicable to nonemployees. This is so because the interests to be balanced in determining the validity of such a rule are very different as between an employee on the premises in connection with his work and an off-duty employee who seeks to enter. The former involves a balancing of statutory rights of self-organization against the employer's interest in production, safety, or discipline, and in this situation, the statutory rights prevail (unless it can be shown that interference with those rights is essential) because an employer may not close off this normal channel of communication among the workers without proper justification. The latter situation, however, requires a balancing of the employees' Section 7 rights against the employer's private property rights. (Footnotes omitted.)

Accord: *Diamond Shamrock Co.* v. *N. L. R. B.*, 443 F. 2d 52, 58 (3rd Cir. 1971) and *McDonnell Douglas Corp.* v. *N. L. R. B.*, 472 F. 2d 539, 547 (8th Cir. 1973), where both courts ruled, contrary to the Board's reliance on *Republic Aviation*, that *Babcock & Wilcox* was determinative of the access rights of off-duty employees seeking to assert Section 7 rights at their places of employment; and *Visceglia, t/a Peddie Building*, fn. 11, *supra*, where the Board and Court of Appeals both applied *Babcock & Wilcox* to determine the access rights of employees who sought to picket their employer on premises where they had no work relationship. The same reasoning similarly encompasses persons, such as the pickets in the instant case (see fn. 7, *supra*), who, while technically employees of a tenant, also had no work relationship at the Center. See, e. g., *N. L. R. B.* v.

Great Atlantic and Pacific Tea Co., 277 F. 2d 759, 763 (5th Cir. 1960), where, relying upon *Babcock & Wilcox*, the court below held that Section 7 created no right for persons employed at certain locations to gain access to other supermarkets where they did not work.

C. The Court of Appeals' Alternative Test, If Correct, Was Misapplied.

The Court of Appeals, on the basis that in *Babcock & Wilcox*, in contrast to the instant case, "the property rights involved were those of the employer, not a third party; and the labor rights involved were organizational rights, not consumer picketing rights," concluded that *Babcock & Wilcox* "is not the complete answer." Pet. App., p. A9. It determined, therefore, that, as a prerequisite to the *Babcock & Wilcox* analysis, "the relationship between the picketing and shopping center operations . . . is relevant to determining whether the pickets have any right *at all* to conduct consumer picketing inside a private enclosed mall . . ." Pet. App., p. A10 (emphasis added). Although Hudgens did not urge this additional test below, and has reservations with respect to the property ownership[15] and labor rights[16] distinctions

15. *Babcock & Wilcox* drew no distinction between whether the property rights were those of an employer or a third party, nor have other courts of appeal in related situations. *N. L. R. B.* v. *Visceglia, supra*, 498 F. 2d at 50; *N. L. R. B.* v. *Solo Cup Co.*, 422 F. 2d 1149 (7th Cir. 1970). Moreover, a differentiation in the *Babcock & Wilcox* accommodation dependent on who possesses title to the property is no more supportable than a variance dependent on whether an employer in a given case is the owner of the property or simply a lessee thereof. Hudgens' property rights and his income are no less at stake than those of the employers involved in *Babcock & Wilcox* and *Central Hardware*, and he is similarly bound by the negative covenants of Section 8 of the Act. There is no reason, therefore, why his constitutionally protected property rights should be accorded any less protection by the Board; indeed, it would appear confiscatory to subject a shopping center owner to the full panoply of the Act's proscriptions in the same fashion as other employers, but to an unequal protection of his property rights.

16. Since organizational rights and consumer picketing rights are both founded in Section 7 of the Act, the Board has applied the identical *Babcock & Wilcox* test irrespective of whether consumer picketing (as in the instant case, *S. E. Nichols of Ohio* and *Visceglia t/a Peddie Buildings)* or organizational activity is involved. To be sure, *Central Hardware* did observe that *Babcock & Wilcox* "requires a 'yielding' of property rights only in the context of an organizational campaign" (407 U. S. at 544); at the same time, however, *Central Hardware* also noted that "[t]he Court in *Babcock* stated the *guiding principle* for adjusting conflicts between *Section 7 rights* and property rights" *(ibid.;* emphasis added). In any event, neither view detracts from Hudgens' approach; it either suggests that, as the Board concluded, *Babcock & Wilcox* alone is determinative or, as the Court of Appeals' concluded, there must also be a relationship test in addition to the *Babcock & Wilcox* analysis.

drawn by the Court of Appeals, even assuming *arguendo* that a relationship standard should be utilized, the Court of Appeals misapplied that criterion in the present case. If, as it held, a relationship requirement is fulfilled as long as picketing is directed to those members of the general public who might patronize any store in a shopping center (Pet. App., p. A11), virtually any picketing directed at a center tenant would meet this test. The relationship test would thus be meaningless surplusage.

A meaningful relationship requirement must focus upon whether there is a labor dispute at the situs of the picketing. As suggested by this Court in *Logan Valley*, the "message sought to be conveyed to the public [must] concern[ed] . . . the manner in which that particular market was being operated." 391 U. S. at 320, n. 9. There is a sound basis for this rule; although there may be a derogation of property rights where a dispute arises concerning the use to which property is being put by a tenant—because the shopping center owner may exercise leverage against the tenant to remedy the problem—no such derogation should be permitted where, owing to the remoteness of the dispute, there is no such meaningful power in the center owner. Thus, for instance, in a dispute involving employees of a tenant working at the situs, a center owner could intervene in the dispute to pressure, or conceivably even remove, an offending tenant to insure tranquility on his property. The sufferance of picketing would then be the price the property owner

would pay for failing to successfully minimize disputes between tenants and their employees. But the property owner should not be required to burden his property as a forum for communicating to the public a dispute at a distant location, not involving any employee who works on his property, and over which he is powerless to exert any influence.

In this case, the Union had no dispute concerning the operation of any store at the Center, nor with the wages paid any employees; nor was it protesting the Butler Center store's non-union status or attempting to organize its employees. The picketing was, in short, wholly unrelated to the use to which the Center property was put; it was, instead, more closely akin to *Lloyd* where the shopping center owner was not required to suffer the presence of demonstrators on his premises because their message did not pertain to the utilization of his property. A relationship test, if properly applied, would result, therefore, in a determination that the pickets had no right to engage in consumer picketing at the Center.

II.

THE BOARD AND COURT OF APPEALS MISAPPLIED THE BABCOCK AND WILCOX TEST OF ALTERNATIVE CHANNELS OF COMMUNICATION.

Both the Board and Court of Appeals disregarded this Court's admonition in *Babcock & Wilcox* that "[a]ccommodation between . . . [Section 7 rights and private property rights] must be obtained with as little destruction of one as is consistent with the maintenance of the other." 351 U. S. at 112. This accommodation requires that alternative channels for Section 7 expression must be proven unavailable before an appropriation of constitutionally-protected (see *Lenrich Associates* v. *Heydra*, 264 Or. 122, 504 P. 2d 112 (1972); and *Diamond* v. *Bland*, 11 Cal. 3d 331, 113 Cal. Rptr. 468, 521 p. 2d 460 (1974), *cert. den.*, 419 U. S. 885 (1974)) property rights can be justified. The test, as the Board itself has observed, is "not one of reasonable convenience, but rather whether the [desired audience is] . . . beyond the reach of reasonable efforts to communicate with them." *Monogram Models, Inc.*, 192 NLRB 705, 706 (1971). See also *Dexter Thread Mills*, 199 NLRB 543 (1972), where the Board noted that because alternatives may be either more expensive or less convenient is of no relevance. Nor is a union entitled to always picket at the location where its "psychological pressures" are maximized; it may not picket, for example, inside a store even though this location would surely increase such pressure. See, e.g., *Marshall Field & Co.* v. *N. L. R. B.*, 200 F. 2d 375 (7th Cir. 1952). The *Babcock & Wilcox* rule may thus have "the effect of closing off one channel of communications; but the Taft-Hartley Act does not command that labor organizations as a matter of abstract law, under all circumstances, be protected in the use of every possible means of reaching [its desired audience]." *N. L. R. B.* v. *United Steelworkers of America* [*Nutone, Inc.*], 357 U. S. 357, 363-364 (1958). All that is required is that a union have a safe and effective means of communicating its message—by picketing or otherwise. The Union had such safe and effective means in this case apart from picketing on the Center mall.

Although the Court of Appeals properly found that the Union's intended audience broadly included all potential customers of Butler (Pet. App., p. A12), it concluded that because this audience was so diffuse, in comparison to the relatively limited and definable audience involved in an organizational situation, any alternatives to picketing at or near the mall were, "patently inappropriate." (Pet. App., p. A13). In its view, when a union wishes to engage in shopping center consumer picketing, it can dislocate private property rights virtually at will because "a location at or near the mall [is] essential to any kind of reasonably effective communication." (Pet. App., p. A14). There is, in effect, because of "the realities of the situa-

tion" and "the nature of the use to which the property is put," as well as "the potential for dilution," no other available, effective alternative.

Contrary to the Court of Appeals' view, however, it is precisely the broad intended audience which was the subject of the Union's message that serves to render other alternatives particularly *appropriate*. The Union here manifestly had countless, varied means of communication available, in addition to the picketing in front of the Butler store, as alternative means to reach its desired audience. For example, the Union, in contrast to the situation in *Logan Valley* (see 391 U. S. at 321-323), could have safely and effectively picketed, if it chose to supplement its picketing at the Butler warehouse, on the public right-of-ways to the entrances to the Center. See fn. 2, *supra*. Indeed, as the Board observed in the analogous shopping center situation in *S. E. Nichols, supra*, 200 NLRB at 1132, n. 12: "[T]he record shows that the parking lot is entered from a public street, and no reason appears why the Union could not have made its appeals at that point."[17]

In addition, as the Board observed in *The Falk Corp.*, 192 NLRB 716, 721 (1971), newspaper, radio, and television are alternative means of communication expressly contemplated by *Babcock & Wilcox*. The record here amply demonstrates the effective and economical availability of each of these media[18]—media devices which if suited for fulfilling *Babcock & Wilcox*

17. The assertion that picketing at the entrances to the Center, or presumably even at the entrances to the enclosed mall, would necessarily have "secondary effects" (Pet. App., pp. A15, A19) is belied by the Board's long-established rules regulating common situs picketing. See *N. L. R. B.* v. *Denver Building & Construction Trades Council*, 341 U. S. 675 (1951); and *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547 (1950). A union is only required to abide by these well-known rules—as occurs in the construction industry virtually every day—in order to avoid any unlawful "secondary effects."

18. Newspaper (App., pp. 159-162, 65); television (App., pp. 163-167, 66-69); radio (App., pp. 167-171, 70-74).

requirements in the relatively limited audience attendant to the organizational context, are, *a fortiori*, particularly apropos for reaching the broad-based audience which was the subject of the Union's appeal here. In addition, uncontradicted evidence in this case established the availability of numerous other methods—direct mail (App., pp. 171-172), handbills (App., pp. 172-173), billboards (App., pp. 173-174) and other techniques (App., pp. 174-175)—which unions have traditionally utilized in the past[19] to communicate a message (App., pp. 179-180) and which were equally feasible in this case. There is no reason, in sum, why the Union could not have employed, in order to induce customers and potential customers *not* to patronize the Butler Center store, the very same techniques that the Center and Butler have successfully utilized to encourage such patronage. Expert testimony, in fact, was introduced by Hudgens to show that, in attempting to express a message to customers and potential customers of the Center, picketing was both less effective and more expensive than many other means of communication (App., pp. 177-179). The Union's desired audience in this case, in short, was not accessible only through picketing in front of the Butler store; the Union simply chose not to utilize other available and effective alternative channels of communication. It had no such right under the Act.

19. See, e.g., *Honolulu Typographical Union No. 37 (Hawaii Press Newspapers)*, 167 NLRB 1030, 1038 (1967), where, in seeking to communicate a message to patrons at a shopping center, the union engaged in a variety of imaginative techniques on public property to attract "a large and appreciative audience."